SUPREME COURT, U. S.

OCT 24 1968

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 686

ROBERT WILBUR BALL, Petitioner

vs.

THE STATE OF FLORIDA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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Petitioner prays that a writ of certiorari issue to review the opinon of the District Court of Appeal of Florida, Third District filed March 5, 1968, as affirmed by the Order Denying Rehearing filed March 22, 1968, and Denial of Petition for Writ of Certiorari by the Supreme Court of Florida on July 23, 1968.

OPINIONS BELOW

Adjudication and sentence were entered by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, on December 6, 1966, and recorded in Circuit Court Minute Book No. 780 at Page 167, 168.

The opinion of the District Court of Appeal, Third District was filed March 5, 1968, and is recorded in Minute Book 25 at Page 138. Rehearing was denied on March 22, 1968. Denial of Rehearing is recorded at Minute Book 25, Page 233. The opinion of the District Court of Appeal of Florida, Third District is reported at 207 So.2d 492. Petition for Writ of Certiorari was denied by the Supreme Court of Florida on July 23, 1968.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) because a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States, was denied by the District Court of Appeal of Florida, Third District. Jurisdiction is also invoked under Rule 19(1)(a) of the Rules of the Supreme Court of the United States, adopted June 12, 1967, effective October 2, 1967, because a State Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

I.

WHETHER DUE PROCESS OF LAW IS DENIED WHEN A SECOND DEGREE MURDER CONVICTION IS RETURNED AND SENTENCE IS IMPOSED THEREON ALTHOUGH INDICTMENT WAS FOR FIRST DEGREE MURDER AND THE EVIDENCE WAS SUCH AS TO MAKE SECOND DEGREE MURDER IMPOSSIBLE.

II.

WHETHER DUE PROCESS OF LAW IS AFFORDED PETITIONER WHEN A CONSOLIDATED TRIAL IS HELD ON TWO SEPARATE INDICTMENTS FOR MURDER AND THE JURY IS INSTRUCTED BY THE COURT THAT IF THEY FOUND THE DEFENDANT GUILTY OF EITHER OR BOTH OF THE CRIMES THE VERDICT WOULD BE GUILTY.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Constitution of the United States - Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 Revised Rules of the Supreme Court of the United States Rule 19. Considerations governing review on certiorari

1 (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Florida Statutes - 782.04

(1) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when comitted in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping shall be murder in the first degree, and shall be punishable by death.

(2) When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree, and shall be punished by

imprisonment in the state prison for life, or for any number of years not less than twenty years.

Florida Statutes - 919.14

If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

STATEMENT OF THE CASE

ROBERT WILBUR BALL married REGINA DARLENE BALL in North Miami Beach, Florida in 1961. He adopted her child in 1964. The couple's marital difficulties led to separations, the longest for a month, but each time they reunited. In December of 1964, REGINA DARLENE BALL filed a suit for divorce. ROBERT BALL continued to see his wife and son for dinner and overnight visits.

On August 1, 1966, at his wife's invitation, BALL entered her house and found DE LLOYD D. NASH and his wife nude in bed. BALL had brought a 38 caliber gun. NASH also had a 38 caliber gun. Gunfire was exchanged;

both guns were fired; BALL was wounded and his wife and NASH were killed.

In response to charges for both homicides, Petitioner asserted that he had fired in self defense.

On March 8, 1968, grand jury indictments for first degree murder were filed charging ROBERT WILBUR BALL with effecting the deaths by murder on August 1, 1965, of DE LLOYD D. NASH and REGINA DARLENE BALL. BALL entered pleas of not guilty.

Trial by jury was held and the jury verdicts finding ROBERT WILBUR BALL guilty of murder in the second degree on each charge were filed. An appeal was taken to the District Court of Appeal, Third District of the State of Florida. The opinion of that court affirming the judgments of conviction are appended. Petition for Writ of Certiorari filed in the Supreme Court of Florida was denied. That order of denial is also appended.

HOW THE FEDERAL QUESTION WAS RAISED

The first point was raised at the trial level by objections. It was also raised by Motions for Directed Verdict and Motion for New Trial. All objections and motions were denied. It was raised by Assignments of Error and argument in the appellate court.

The second point was raised for the first time in the District Court of Appeal, Third District and also raised in Petition for Writ of Ceriorari in the Supreme Court of Florida.

REASONS FOR GRANTING THE WRIT

QUESTION I

WHETHER DUE PROCESS OF LAW IS DENIED WHEN A SECOND DEGREE MURDER CONVICTION IS RETURNED AND SENTENCE IS IMPOSED THEREON ALTHOUGH INDICTMENT WAS FOR FIRST DEGREE MURDER AND THE EVIDENCE WAS SUCH AS TO MAKE SECOND DEGREE MURDER IMPOSSIBLE.

In this case ROBERT WILBUR BALL testified that he shot in self defense. He swore that NASH had started shooting at him and that he, BALL, then returned the fire. That statement made at the trial is without contradiction. As a result of that testimony Petitioner contends that the jury had but two choices. It either believed his testimony or it did not believe his testimony. Although other expert evidence was presented seeking to establish which bullets resulted in the death of Mrs. Ball and Nash, no other evidence in any way involved the sequence of shooting. BALL's testimony was material and could not be ignored.

In Mayo v. State, (Fla.) 71 So.2d 899, it was directly held that the defendant's version of a homicide could not be ignored

where there was an absence of other evidence sufficient to contradict his explanation. In Holton v. State. 87 (Fla.) 65, 99 So. 254, the Supreme Court of Florida reversed a second degree conviction since the statement given by defendant in that case required a conviction of first degree murder or acquittal. The record could not support a second degree conviction. In this case the record can not support a second degree conviction. BALL clearly testified that he shot at the victims. There was no accident involved. As stated in Holton, supra, his statement to the jury was a practical confession of murder in the first degree unless the jury believed his story. The rejection of murder in the first degree by the jury requires the conclusion that it was not convinced beyond a reasonable doubt that BALL fired first.

The only factual question in the case material to this proceeding is whether BALL fired first or second. If he fired first, first degree conviction was required. If he fired second, acquittal was required and second degree conviction could not stand.

In Green v. United States, 218, F.2d 856 before this Court on other grounds cited in Green v. United States, 355 U.S. 184, 78 S. Ct. 221 (1957), the defendant was convicted of arson and second degree murder. The case was reversed upon the grounds present here. The Court stated among other things:

"In the present case, as in the Goodall case, all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else. Hence there was no reason for a second degree instruction, and giving it was at least technically erroneous."

See also Goodal v. United States, 180 F.2d 397.

QUESTION II

WHETHER DUE PROCESS OF LAW IS AFFORDED PETITIONER WHEN A CONSOLIDATED TRIAL IS HELD ON TWO SEPARATE INDICTMENTS FOR MURDER AND THE JURY IS INSTRUCTED BY THE COURT THAT IF THEY FOUND THE DEFENDANT GUILTY OF EITHER OR BOTH OF THE CRIMES THE VERDICT WOULD BE GUILTY.

No on can say from the charges what the jury actually found in this case. It is impossible to say whether the jury found BALL guilty of shooting NASH, whether the jury found BALL guilty of shooting Mrs. Ball or whether the jury found BALL guilty of shooting both. It is also possible that the jury believed that BALL killed NASH in self defense.

There were two separate indictments. Both cases were consolidated for the purpose of trial. Clearly BALL could have been guilty

of one charge and innocent of the other or innocent in both cases. It is the contention of Petitioner that a fair trial was denied in the absence of clear instructions to the jury explaining the various possibilities. Instead the Court charged the jury to find BALL guilty if it believed he was guilty of either or both of the crimes. See Appendix 8A, 9A.

Probably the Court felt that the jury knew that it had the right to acquit if it did not believe BALL was guilty in both cases, but no one can say that the jury understood that for, to compound the difficulty, the Court did not charge conversely that if the jury believed that he was innocent on either or both indictments, they should return a verdict of not guilty.

Petitioner finds no authority directly on point in support of this position other than the clear, inescapable, logical conclusion that the Court's instructions were confusing on a material point. The point becomes more important since the jury could well have believed that self defense existed with NASH but not with Mrs. Ball and were not told what the legal effects of that conclusion would be.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be granted so that

record may be reviewed in its entirety.

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Attorneys for Petitioner

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District, was mailed to HON. EARL FAIRCLOTH, Attorney General, 1350 N. W. 12th Avenue, Miami, Florida, this_____day of October, 1968.

Milton E. Grusmark